

NO. SC84587

IN THE SUPREME COURT OF MISSOURI

STATE EX REL. ROBERT L. MEIER, JR.,

Petitioner,

v.

GENE STUBBLEFIELD,

Superintendent, Missouri Eastern Correctional Center

Respondent.

ORIGINAL PROCEEDING IN HABEAS CORPUS

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

JEREMIAH W. (JAY) NIXON
Attorney General

ANDREW W. HASSELL
Assistant Attorney General
Missouri Bar No. 53346

P. O. Box 899
Jefferson City, MO 65102-0899
(573) 751-3321

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES	2
JURISDICTIONAL STATEMENT	3
STATEMENT OF FACTS	4
ARGUMENT	5

I. This Court should decline to review the petition for writ of habeas corpus because petitioner’s claim that his attorney was ineffective by failing to file a notice of appeal is procedurally barred in that petitioner failed to raise this claim in a motion for post-conviction relief under Supreme Court Rule 29.15. Petitioner cannot overcome his default because petitioner cannot show “cause and prejudice” in that petitioner knew or reasonably should have known that his attorney was not prosecuting petitioner’s appeal well before the Rule 29.15 filing deadline. (Responds to Petitioner’s point I(B)). 5

II. This Court should deny the petition for writ of habeas corpus because the record in this case is insufficient to show that trial counsel had a duty to file a notice of appeal in that petitioner does not present any evidence concerning trial counsel’s reasons for not filing a notice of appeal.

(Responds to Petitioner’s point I(A)). 11

CONCLUSION	15
------------------	----

CERTIFICATE OF COMPLIANCE AND SERVICE	16
---	----

TABLE OF AUTHORITIES

Cases

<u>Bain v. State</u> , 59 S.W.3d 625 (Mo.App., E.D. 2001)	9
<u>Brown v. State</u> , 66 S.W.3d 721 (Mo. banc 2002)	6, 7
<u>McIntosh v. Haynes</u> , 545 S.W.2d 647 (Mo. banc 1977)	13
<u>Murray v. Carrier</u> , 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)	7
<u>Reuscher v. State</u> , 887 S.W.2d 588 (Mo. banc 1994), <i>cert. denied</i> 514 U.S. 1119 (1995)	6
<u>Roe v. Flores-Ortega</u> , 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000)	11-13
<u>State ex rel. Nixon v. Jaynes</u> , 63 S.W.3d 210 (Mo. banc 2001)	5
<u>State ex rel. Simmons v. White</u> , 866 S.W.2d 443 (Mo. banc 1993)	5
<u>State v. Booker</u> , 945 S.W.2d 457 (Mo.App., W.D. 1997)	13
<u>State v. Kinder</u> , 942 S.W.2d 313 (Mo. banc 1996), <i>cert. denied</i> 522 U.S. 854 (1997)	11, 12
<u>State v. Tokar</u> , 918 S.W.2d 753 (Mo. banc), <i>cert. denied</i> 519 U.S. 933 (1996)	12
<u>Strickland v Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	11, 12

Rules

Supreme Court Rule 29.15	5-7, 14
Supreme Court Rule 30.03	9
Supreme Court Rule 68.03	14

JURISDICTIONAL STATEMENT

This case is an original proceeding in habeas corpus. This Court has jurisdiction to determine original writs pursuant to Article V, §4, of the Missouri Constitution (as amended 1976). Petitioner Robert L. Meier, Jr., is currently incarcerated at the Missouri Eastern Correctional Center in Pacific, Missouri. Respondent Gene Stubblefield, superintendent of the Missouri Eastern Correctional Center, is the proper party respondent. Missouri Supreme Court Rules 91.04 and 91.07.

STATEMENT OF FACTS

Petitioner Robert L. Meier, Jr., was convicted in the St. Charles County Circuit Court of three counts of child molestation in the first degree, a Class C felony, §566.067, RSMo 1994, and sentenced to two consecutive three year sentences and one concurrent three year sentence in the custody of the Missouri Department of Corrections. Pet. at 2. Petitioner was represented at trial by Timothy W. Kelly. Pet. at 2. Sentencing occurred on August 28, 1998. Transcript of Sentencing Hearing at 1. Petitioner did not indicate on the record that he wished to file an appeal at the time of sentencing. Id. at 13-14. Following petitioner's trial and sentencing, neither Mr. Kelly nor any other person filed a notice of appeal. Pet. at 2. On October 7, 1998, Mr. Kelly later filed a document in St. Charles County Circuit Court entitled "Motion to Find Defendant to be Indigent." Pet. Br. at A5. Petitioner has not had a direct appeal of his convictions and sentences.

Petitioner filed petitions for writ of habeas corpus in the St. Louis County Circuit Court and the Missouri Court of Appeals, Eastern District. Both of these petitions were denied. Return Exhibits E and G. Petitioner then applied to this Court for a writ of habeas corpus.

ARGUMENT

I. This Court should decline to review the petition for writ of habeas corpus because petitioner’s claim that his attorney was ineffective by failing to file a notice of appeal is procedurally barred in that petitioner failed to raise this claim in a motion for post-conviction relief under Supreme Court Rule 29.15. Petitioner cannot overcome his default because petitioner cannot show “cause and prejudice” in that petitioner knew or reasonably should have known that his attorney was not prosecuting petitioner’s appeal well before the Rule 29.15 filing deadline.

(Responds to Petitioner’s point I(B)).

Petitioner alleges that trial counsel was ineffective for failing to file a notice of appeal. Petitioner admits that he did not raise this claim in a Supreme Court Rule 29.15 motion. Pet. Br. at 11.

This Court has consistently held that “habeas corpus is not a substitute for appeal or post-conviction proceedings.” State ex rel. Simmons v. White, 866 S.W.2d 443, 446 (Mo. banc 1993). A petitioner’s failure to raise claims on direct appeal or in a post-conviction motion “waives them and [the petitioner] cannot raise them in a subsequent petition for *habeas corpus*.” State ex rel. Nixon v. Jaynes, 63 S.W.3d 210, 214 (Mo. banc 2001)(emphasis in original). A petitioner who fails to raise claims in post-conviction proceedings has procedurally defaulted on those claims. Id.

Petitioner in this case alleges that his attorney was ineffective for failing to file a notice of appeal. This Court has ruled that Rule 29.15 is the “exclusive remedy” for constitutional claims related to petitioner’s conviction or sentence. Reuscher v. State, 887 S.W.2d 588, 590 (Mo. banc 1994), *cert. denied* 514 U.S. 1119 (1995); Rule 29.15(a). Claims of ineffective assistance of counsel under the

Sixth Amendment are constitutional claims related to petitioner's conviction and sentence. Petitioner did not raise his ineffective assistance of counsel claim in a Rule 29.15 motion. Petitioner has therefore defaulted on his claim for relief.

In order to receive relief on his procedurally barred claim through habeas corpus, petitioner must show

(1) a claim of actual innocence or (2) a jurisdictional defect or (3)(a) that the procedural default was caused by something external to the defense—that is, a cause for which the defense is not responsible—and (b) prejudice resulted from the underlying error that worked to the petitioner's actual and substantive disadvantage.

Brown v. State, 66 S.W.3d 721, 725-26 (Mo. banc 2002). Petitioner in this case does not allege any jurisdictional defects nor a claim of actual innocence supported by newly discovered evidence.

Therefore, in order to overcome his default, petitioner must establish "cause and prejudice."

"Cause" is defined as showing that the procedural default is caused by something external to the defense. Brown, supra. The United States Supreme Court has defined cause as "whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 388, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397, 408 (1986). The petitioner therefore must show that some factor external to him was the cause for his default. Petitioner in this case makes two claims of cause: first, that his failure to file the post-conviction motion was due to counsel's ineffective assistance by not filing the notice of appeal, Pet. Br. at 18-19, and second, that he did not know that his attorney had not filed a notice of appeal until well after the time for filing a post-conviction motion had passed, *see Brown, supra*, at

731, Pet. Br. at 19-20. These two allegations are related in that trial counsel's failure to file the notice of appeal, an event petitioner was not aware of, caused petitioner to believe that the post-conviction time limits had not yet begun to run.

The default in this case is petitioner's failure to file a Rule 29.15 motion alleging that counsel was ineffective for failing to file a notice of appeal. Petitioner had ninety days from the date that he was received into the Department of Corrections to timely file a Rule 29.15 motion. Rule 29.15(b). Petitioner therefore must show that some cause external to him prevented him from filing a Rule 29.15 motion alleging ineffective assistance of counsel within ninety days from the date the petitioner arrived in the Department of Corrections.

Petitioner arrived at the Department of Corrections on August 31, 1998. Return Exhibit A at 3. Petitioner therefore had until November 29, 1998, to file a Rule 29.15 motion. Petitioner received a "Motion to Find Defendant to Be Indigent" on or about October 7, 1998. Affidavit at 2, Pet. Br. at A5. After that time, according to petitioner, attorney Kelly stopped returning phone calls and letters, and eventually, Kelly's office would not take petitioner's calls. Affidavit at 2. Petitioner never received a copy of any notice of appeal.

The facts in this case show that petitioner never received a copy of the notice of appeal, and that according to petitioner, shortly after October 7, 1998, attorney Kelly refused to speak with petitioner, respond to petitioner, or accept petitioner's calls. After October 7, 1998, petitioner had fifty-three days to file a Rule 29.15 motion. Counsel's refusal to deal with the client, coupled with the fact that counsel had not sent petitioner a copy of a notice of appeal, surely put petitioner on notice that the appeal, at a minimum, was not proceeding and that attorney Kelly was not representing his interests.

Based on these facts, petitioner had a facially valid claim that his attorney was ineffective at that stage of the direct appeal. Petitioner thus knew about his attorney's "abandonment." Petitioner therefore cannot use his alleged lack of knowledge as cause.

Because petitioner should have known about his attorney's "abandonment" well before the Rule 29.15 deadline, petitioner also cannot claim that he failed to file a motion based on his attorney's ineffective assistance. *See Bain v. State*, 59 S.W.3d 625, 625 (Mo.App., E.D. 2001)(relief granted on PCR alleging that attorney failed to file timely notice of appeal). As shown above, petitioner should have known prior to the deadline that this attorney was not representing his interests. Petitioner does not state that any factor other than the lack of knowledge kept him from raising this claim in a *pro se* Rule 29.15 motion.¹ Trial counsel's ineffective assistance therefore was irrelevant to the claim at hand.

¹Even if petitioner discovered that counsel had failed to file a notice of appeal outside the time limits of Rule 29.15, petitioner had another option: filing a motion to file a late notice of appeal in the Missouri Court of Appeals, Eastern District, pursuant to Supreme Court Rule 30.03, which authorizes the filing of a notice of appeal up to one year after a final judgment is issued. Assuming petitioner's version of the facts to be correct, he would have shown good cause in a Rule 30.03 motion. However, petitioner failed to file such a motion. Petitioner's actions support an inference of knowledge that his appeal was not progressing: petitioner filed a disciplinary action in prior to September 2, 1999 against his attorney claiming abandonment. *See* Pet. Ex. D. At the time petitioner filed the disciplinary complaint, petitioner was within the one-year window to file a late notice of appeal provided by Rule 30.03. Petitioner at this time should have investigated the status of his appeal. Petitioner cannot show

For this reason, petitioner cannot show cause, and thus cannot overcome his procedural default.

Petitioner's claim for relief therefore is barred from further review.

that he was prevented from investigating the status of his case and filing a late notice of appeal, especially in light of his attorney's refusal to communicate with petitioner.

II. This Court should deny the petition for writ of habeas corpus because the record in this case is insufficient to show that trial counsel had a duty to file a notice of appeal in that petitioner does not present any evidence concerning trial counsel's reasons for not filing a notice of appeal. (Responds to Petitioner's point I(A)).

The United States Supreme Court and this Court have clearly stated the two-part rule for ineffective assistance of counsel: first, that counsel's performance was deficient, and second, that petitioner was prejudiced by counsel's actions. Strickland v Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); State v. Kinder, 942 S.W.2d 313, 335 (Mo. banc 1996), *cert. denied* 522 U.S. 854 (1997). This test applies to cases in which an attorney fails to file a notice of appeal. Roe v. Flores-Ortega, 528 U.S. 470, 477, 120 S.Ct. 1029, 1035, 145 L.Ed.2d 985 (2000). The Supreme Court in Roe specifically held that "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successfully ineffective assistance of counsel claim entitling him to an appeal." Roe, 528 U.S. at 484.

Strickland also teaches that "a court must indulge in a strong presumption that counsel's conduct falls within the wide range of professional assistance." Strickland, 466 U.S. at 689. Further, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id., 466 U.S. at 690. Finally,

the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based,

quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. ***** In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be crucial to a proper assessment of counsel's other litigation decisions.

Id., 466 U.S. at 691. The teaching of Strickland thus is that counsel's actions are presumed competent, and that investigation into counsel's acts is warranted in, and crucial to, many situations where conversations between counsel and the defendant are critically important, as they are in this case. The Court in Roe v. Flores-Ortega, *supra*, stated that, citing Strickland, it was "impossible" to determine whether the petitioner had instructed counsel to file an appeal and what consultation, if any, had occurred or should have occurred between attorney and client. Roe, *supra*, 528 U.S. at 487.

This Court has recognized these principles enunciated in Strickland. See Kinder, *supra*, at 335. This Court has also ruled that in order to rebut the presumption that counsel acted reasonably, the defendant must present evidence concerning trial counsel's motives. See State v. Tokar, 918 S.W.2d 753, 768 (Mo. banc), *cert. denied* 519 U.S. 933 (1996)(defendant's claim failed because "introduced no evidence regarding trial counsel's failure to object to this argument, despite questioning them regarding other issues at the post-conviction relief hearing."). See also State v. Booker, 945 S.W.2d 457, 459 (Mo.App., W.D. 1997)(In a case where the defendant relied exclusively on the trial transcript to show ineffective assistance of counsel, "[the defendant] did not call his attorney to seek an explanation for the absence of objections. This does not rebut the presumption.").

In this case, petitioner has alleged that counsel failed to fail a notice of appeal when petitioner had instructed him to do so. However, in habeas cases, allegations alone do not constitute substantial evidence on the matter. McIntosh v. Haynes, 545 S.W.2d 647, 654 (Mo. banc 1977). In this case, habeas corpus is being used to assert a claim that is similar to a Rule 29.15 action. Rule 29.15 requires that a petitioner produce evidence concerning trial counsel's motives. Tokar, *supra*; Booker, *supra*. Petitioner has not done so in this case. The record is therefore incomplete concerning trial counsel's reasons for not filing a notice of appeal. Trial counsel may opine that petitioner, in fact, decided not to file a notice of appeal based upon consultation with counsel and instructed counsel not to file a notice of appeal. This course of action would not constitute ineffective assistance of counsel. Roe, *supra*, 528 U.S. at 477. Petitioner therefore has not met his burden of overcoming the presumption that trial counsel was ineffective, and his claim therefore fails at this time.

Petitioner's claim, however, is not completely developed. Petitioner has pled specific facts that allege that counsel was ineffective. If this were a Rule 29.15 proceeding, an evidentiary hearing would be held to receive evidence concerning counsel's failure to file the notice of appeal. Supreme Court Rule 29.15(i). Because this petition is so similar to a Rule 29.15 proceeding, respondent submits that such a hearing would be appropriate in this case if this Court decides that more evidence is necessary for the consideration and resolution of this case. This Court has authority to appoint a master under Supreme Court Rule 68.03 to hear the evidence, make determinations of credibility and findings of fact, and provide a report of the proceedings to this Court. Such a proceeding, if this Court finds it necessary, would allow for a complete record to be made concerning counsel's alleged errors.

CONCLUSION

For the aforementioned reasons, respondent prays that this Court DENY the petition for writ of habeas corpus.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

ANDREW W. HASSELL
Assistant Attorney General
Missouri Bar No. 53346

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06 and contains _____ words, excluding the cover and this certification, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses, using McAfee Anti-virus software, and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of _____, 2002, to:

Robert L. Hess, II, Esq.
Barbara L. Miltenberger, Esq.
HUSCH AND EPPENBERGER, LLC
235 East High Street, Suite 300
Jefferson City, Missouri 65102

JEREMIAH W. (JAY) NIXON
Attorney General

ANDREW W. HASSELL
Assistant Attorney General
Missouri Bar No. 53346

P. O. Box 899
Jefferson City, MO 65102-0899
(573) 751-3321

Attorneys for Respondent